91-934

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RAFAEL SANTIAGO,

Petitioner,

vs.

NEW YORK STATE DEPARTMENT
OF CORRECTIONAL SERVICES,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MICHAEL H. SUSSMAN
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(914)-294-3991

DECEMBER 9, 1991

QUESTIONS PRESENTED

1. WHETHER THE FOURTEENTH AMENDMENT AUTHORIZES INDIVIDUALS TO SUE DIRECTLY AGAINST STATES WHICH HAVE VIOLATED THEIR CONSTITUTIONAL RIGHTS?

2. WHETHER THE FOURTEENTH AMENDMENT WORKED BY ITS VERY TERMS AN ABROGATION OF THE ELEVENTH AMENDMENT?

3. WHETHER BY ENACTING THE FOURTEENTH AMENDMENT THE STATES WAIVED ANY CLAIM OF SOVEREIGN IMMUNITY THEY MIGHT OTHERWISE HAVE HAD?

4. WHETHER PETITIONER SHOULD HAVE BEEN REQUIRED TO NAME INDIVIDUAL AGENTS OF THE STATE, RATHER THAN THE STATE ITSELF, IN A SUIT PREDICATED ON A STATE POLICY AND PRACTICE DENYING HIS RIGHTS ON THE BASIS OF HIS ETHNICITY OR LOSE HIS RIGHT TO OBTAIN INJUNCTIVE RELIEF?

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Petitioner, Rafael Santiago, respectfully requests that the Court issue a writ of certiorari to review the

judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (1a-16a) is reported at 945 F.2d. 25 (2d Cir. 1991). [Accompanying this Petition is an Appendix with both opinions below.] The opinion of the district court (17a-38a) is reported at 725 F.Supp. 780 (S.D.N.Y. 1990) and the district court's denial of respondent's motion to reargue appears at 734 F.Supp. 653 (S.D.N.Y. 1990).

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1991. This court has jurisdiction pursuant to 28 U.S.C. sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the Constitution states:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Fourteenth Amendment to the Constitution states in relevant section:

"Section 1: ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"Section 5. The Congress shall have power to enforce, by appropriate

legislation, the provisions of this article."

STATEMENT OF THE CASE

INTRODUCTION

Petitioner, Rafael Santiago (hereinafter "Santiago" or petitioner) works as a Corrections Officer for the State of New York. In the summer of 1987, the New York State Department of Correctional Services (hereinafter "DOCS" or respondent) deemed him mentally unfit to discharge his duties. After a state-mandated due process hearing, DOCS discharged Santiago from employment. Thereafter, on his appeal, the New York State Civil Service Commission ordered DOCS to retroactively reinstate Santiago with back pay and benefits. The Commission lacked the authority to and did not award Santiago either the attorney's fees and costs arising from these

proceedings or compensatory damages arising from the pain, suffering, humiliation and mental anguish occasioned by DOCS' "mental fitness" discharge.

Petitioner then initiated this action in the district court alleging that DOCS had characterized him mentally unfit as part of a state policy and practice which so labeled a disproportionate number of minority employees in a discriminatory manner in violation of Section 1 of the Fourteenth Amendment.

Petitioner also sued Dr. Melvin Steinhart, a consulting psychiatrist employed by DOCS on a per case basis, claiming that he had intentionally and maliciously falsified psychiatric reports in furtherance of the state's racially discriminatory policy and practice.

DOCS, a state agency, moved to dismiss Santiago's complaint contending

that the Eleventh Amendment barred a judgment awarding money damages against the State or any of its instrumentalities.

The district court denied this motion, holding that the Fourteenth Amendment was passed after the Eleventh Amendment and worked an abrogation of that Amendment. The district court also held that, by ratifying the Fourteenth Amendment, the states had consented to suit notwithstanding the Eleventh Amendment.

DOCS appealed to the Second Circuit which reversed, holding that the Eleventh Amendment worked an absolute bar to this suit which sought money relief directly against a state agency.

As petitioner believes that the Second Circuit has too parsimoniously interpreted Section 1 of the Fourteenth Amendment and elevated form over

substance, he requests that this court grant this petition and review the merits of this "novel" dispute.

BASIS FOR FEDERAL JURISDICTION

The District Court had jurisdiction over this matter pursuant to 28 U.S.C. secs. 1343 (3) and (4).

STATEMENT OF FACTS

As recited by the Court of Appeals, the relevant facts are as follows:

On June 15, 1987, Santiago, an Hispanic corrections officer employed by DOCS, was suspended from work after an altercation with a supervisor. Following this incident, which was the culmination of several months of harassment by his supervisors, Santiago requested and received a leave of absence from the facility. During this leave, Santiago was treated for stress-related disorder by a private psychotherapist. In late June,

Santiago's psychologist informed DOCS that the officer would be fit to return to work on July 15, 1987. DOCS refused to permit Santiago to return to work and sent him to state facilities for psychological testing.

Through its consultants and staff, DOCS determined that petitioner was unfit to resume his duties and on August 13, 1987, DOCS placed petitioner on involuntary leave of absence. Santiago immediately requested the due process hearing to which state law entitled him. DOCS then scheduled another interview between petitioner and its lead consulting psychiatrist, Dr. Melvin Steinhart. On September 15, 1987, this interview occurred in Albany.

Based on this examination, Steinhart prepared a "materially false and misleading report" confirming his prior

opinion that Santiago was unfit to resume his duties. DOCS relied on this report at the subsequent hearing.

Through expert testimony of his own, Santiago challenged this conclusion at the due process hearing. The hearing officer agreed with DOCS and recommended that Santiago be involuntarily terminated based upon his mental incapacity. DOCS, in turn, adopted the hearing officer's conclusion and so notified Santiago.

Petitioner then appealed to the State Civil Service Commission which reversed the agency's determination of unfitness, ordered him reinstated and granted him back pay through July 15, 1987, the day his psychologist deemed petitioner fit to resume his duties. The Commission entered no other relief in petitioner's favor. (4a).

Santiago then commenced this suit in United States District Court claiming that DOCS and Steinhart had violated several provisions of federal law, including Section 1 of the Fourteenth Amendment by adopting and implementing a "systematic and intentional practice of disciplining Black and Hispanic corrections officers in a discriminatory fashion". Santiago sought damages for emotional distress and reimbursement of his litigation costs from DOCS and punitive damages against Dr. Steinhart. Santiago also sought injunctive relief against retaliation by DOCS for his bringing this suit.

DECISIONS BELOW

DECISION OF THE DISTRICT COURT

The district court denied DOCS' motion to dismiss the Fourteenth Amendment count.

It first noted that this Court and the Second Circuit had reserved decision on the issue of whether the Eleventh Amendment immunizes a state agency against damage actions brought directly under the equal protection clause of Section 1 of the Fourteenth Amendment. Edelman v. Jordan, 415 U.S. 651, 694,n.2 (1974)(Marshall, J. dissenting) and Holley v. Lavine, 605 F.2d 638, 648 (2d Cir. 1979).

The district court next observed that only since Hans v. Louisiana, 134 U.S. 1, 10 (1890) has this Court interpreted the Eleventh Amendment as rendering states and their agencies immune from damage suits in federal court by their own citizens. Thus, at the time the Fourteenth Amendment was enacted in 1868, such immunity was not the law of the land.

Since Hans, two exceptions have developed to application of the doctrine of sovereign immunity. The first obtains where Congress intends to hold states liable for damages. See, Pennsylvania v. Union Gas Co., 109 S.Ct. 2273, 2281 (1989). The second applies where a state consents to such a suit. Clark v. Barnard, 108 U.S. 436 (1983). Evidence of this consent may be "constructive", though it must be strong. Edelman v. Jordan, 415 U.S. 651, 673 and Petty v. Tennessee Missouri Bridge Commission, 359 U.S. 275 (1959).

The district court next found that "there is no rational reason why the `law of the land' cannot just as readily satisfy the conditions for an exception [to the Eleventh Amendment] as a statute."

The Fourteenth Amendment, the district court next observed, explicitly

restricts the states. Fitzpatrick v. Bitzer, 427 U.S.445, 453 (1976). Moreover, precedent recognizes the self-effecting nature of this provision. See, The Civil Rights Cases, 109 U.S. 3, 20 (1883)("the Fourteenth Amendment is undoubtedly self-executing without any ancillary legislation".)

Many civil rights cases, including Brown v. Board of Education, 347 U.S. 483 (1954); Milliken v. Bradley, 433 U.S. 267 (1977); University of California v. Bakke, 438 U.S. 256, 289 (1978) and Plyer v. Doe, 457 U.S. 202 (1982) arose **directly** under the equal protection clause, with plaintiffs relying on no other substantive source of legal rights against the alleged abuse of state power. Powers v. Ohio, 111 S.Ct. 1364 (1991) (holding that equal protection clause prohibits a prosecutor from using the state's peremptory

challenges to exclude otherwise qualified and unbiased persons from the petit jury solely on the basis of their race.).

In Milliken, supra., this Court upheld a significant monetary award against the State of Michigan. This award arose from the district court's judgment that compensatory educational services were required to undo the effects of school segregation. In challenging the district court's authority under the Tenth Amendment, Michigan suggested that the Fourteenth Amendment could not be used in a manner which interfered with the "integrity of the structure and functions of state and local government." This Court upheld the district court's order, finding it to be a proper effectuation of remedial principles and, in so doing, implicitly recognized the self-executing

character of Section 1, upon which the judgment was premised.

The district court read Milliken, supra., as a clear signal that Section 1 of the Fourteenth Amendment had vitality independent from Congressional enactments under Section 5. Absent the need for such enforcing legislation, Section 1 vests courts with jurisdiction directly, even absent legislation abrogating the doctrine of sovereign immunity.

The district court next addressed the issue of whether Section 1 of the Fourteenth Amendment permits the award of retroactive monetary relief. In addressing this issue affirmatively, the district court first noted that Santiago had no cause of action against the State under 42 U.S.C. sec. 1983 or under 42 U.S.C. sec. 2000e, et seq. for the relief sought. Thus, the court recognized

properly that "[P]laintiff brings this action under the Constitution to obtain compensation for his expenses and emotional suffering allegedly caused by DOCS' invidious discrimination." (33a).

The district court found that DOCS had failed to cite "statutory language or clear legislative history" providing that a constitutional cause of action against a state agency for expenses and emotional injury cannot complement the statutory schemes for recovery. Cf. Bush v. Lucas, 462 U.S. 367, 378 (1983). (33a-34a, n.8). Indeed, according to the district court, "[I]t would be contrary to the intention of the Fourteenth Amendment to defer to incomplete statutory remedies for violations of equal protection by a state."

In the absence of a statutory remedy against the State, the district

court found precedent for petitioner's action in Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 397 (1971). Moreover, as Bivens, supra., itself recognized the availability of compensatory damages to remedy constitutional violations, the district court perceived no basis for limiting damages against a state in circumstances like these to back pay. As it explained, "DOCS has provided no reason why emotional damages should be available for due process and Fourth Amendment violations, but not equal protection deprivations... The court finds an award for emotional damages and out-of-pocket expenses to be appropriate for the alleged deprivation of equal protection by a state agency's intentional racial discrimination." (37a). On these bases, the district court denied respondent's motion to dismiss.

OPINION OF THE COURT OF APPEALS

The Court of Appeals for the Second Circuit reversed. (1a-16a). The Court of Appeals' opinion rests on the following reasoning:

(a) this Court has disallowed suits against the states under the Fourteenth Amendment except where Congress has clearly abrogated the Eleventh Amendment or the states have consented to such suit.

(b) specifically, according to the Second Circuit, this Court has affirmed judgments requiring states to expend funds in suits brought directly under Sec. 1 of the Fourteenth Amendment, i.e., Milliken, supra., only under the guise of prospective relief. (9a).

(c) addressing the district court's holdings that the Eleventh Amendment does not bar this suit because the Fourteenth Amendment abrogated it and because the

states consented to suit by ratifying it, the Court of Appeals noted that both doctrines are applied only when evidence of congressional or state intent is unmistakably clear. (10a). Section 1 of the Fourteenth Amendment fails this standard and this Court has never held to the contrary. Only where Congress has acted under Section 5 has this Court allowed abrogation of sovereign immunity. (12a). Nor, in light of the language of section 1, did the Court of Appeals find that the states unequivocally expressed their consent to suit. Thus, the Eleventh Amendment barred Santiago's right to seek money damages for injuries allegedly inflicted pursuant to discriminatory state policy and practices.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

"The Fourteenth Amendment is directed to the states. It marked an extension of federal authority, a move toward uniformity throughout the nation in matters of civil liberties, to be attained by the authority of the federal government." A. Bickel, **The Least Dangerous Branch**, Bobbs-Merrill, 7th Printing, 1975, p. 101.

The reasoning of the Court of Appeals conflicts with the logic of this Court's decision in Will v. Michigan, 109 S.Ct. 2304 (1989). There, Justice White held that 42 U.S.C. section 1983 does not countenance suit in state court against a state because the clear reading of section 1983 informs that a state is not a person.

Likewise, a clear reading of Section 1 of the Fourteenth Amendment commands the conclusion that, by its terms, Congress intended to insure that

states and their agencies comply with substantive federal law in their treatment of persons. Gregory v. Ashcroft, 111 S.Ct. 2395, 2405 (1991) (provisions of the Fourteenth Amendment "were specifically designed as an expansion of federal power and an intrusion on state sovereignty", citing City of Rome v. United States, 446 U.S. 156, 179 (1986)); See, Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947).

Likewise, the Second Circuit's opinion misreads the equally clear language of Section 5 of the Fourteenth Amendment. While that provision undoubtedly gives Congress authority to pass laws forwarding the purposes of Section 1, the clear language gives no hint that this was to be the only way to implement Section 1. The judiciary exists as a co-equal branch of government in

large measure to enforce the equal protection and due process guarantees absent Congressional enactment. Indeed, Brown v. Board of Education, supra., the shining moment of the modern judiciary, represents precisely such an application.

And, if the judiciary can require states and their creatures, i.e., local school districts, to re-organize entire modes of operation, expending millions of dollars - all under the authority of Section 1 of the Fourteenth Amendment, Milliken, supra., without implementing Congressional legislation - then how can that same judiciary be without the less intrusive authority to ensure that **individual** citizens find relief from the intentionally discriminatory state practices visited upon them?

As in other Section 1 cases, the scope of the relief requested here is

precisely tailored to the nature and effect of the underlying violations. Milliken v. Bradley, supra. at 283. As such, remedy should be available on behalf of individuals, like Santiago, as well as to classes of persons disadvantaged by prior state action.

Finally, our courts have used the authority Section 1 provides to enforce equal rights not only without Congressional authorization pursuant to Section 5. They have done so against the popular grain of thinking, against Congressional intent, not merely in the absence of Congressional authorization.

1. **In its logic, the decision below conflicts with recent precedent of this court and the clear purposes of the Fourteenth Amendment.**

In Will v. Michigan Dep't. of State

Police, 109 S. Ct. 2304 (1989), the Court extended its prior holding in Quern v. Jordan, 440 U.S. 332 (1979) that the Eleventh Amendment barred federal court actions against states pursuant to 42 U.S.C. sec. 1983. However, in Will, which barred suit in state court against states under 42 U.S.C. sec. 1983, the majority relied heavily on the plain meaning of section 1983 in concluding that states were not among its intended targets. To the question presented: "whether the word "persons" in this statute includes the States and state officials acting in their official capacities", the Court answered in the negative because common usage does not include the sovereign within the term "person". Id. at 2308.

Applying similar plain usage, it is clear that section 1 of the Fourteenth Amendment prevents states from infringing

upon certain enumerated individual rights, i.e., to due process and equal protection. Nothing in the language of the constitutional amendment suggests any hedge or equivocation by Congress about either the subject of this prohibition or its range.

Like the Commerce Clause, the Fourteenth Amendment "does more than confer power on the federal government". It also is "a self-effecting limitation on the power of the states...". Dennis v. Higgins, 111 S.Ct. 865, 870 (1991), violations of which must be cured in a tailored manner.

Put another way, "the plan of the committee", as manifest by the plain language of the drafters of the Amendment, demonstrates the intent to abrogate any sovereign immunity that they may have supposed applied on behalf of states and

against their own citizens. Blatchford v. Native Village of Noatak, 111 S.Ct. 2578, 2581 (1991).

Moreover, as this court recognized last term, when dealing with a statute or an amendment adopted in the middle of the nineteenth century, it is illogical to apply the "unmistakably clear language" rule to decide whether Congress intended to abrogate sovereign immunity. Blatchford, supra., at 2585.

Nor, contrary to the opinion below, could states have adopted the Fourteenth Amendment in the hope that it would leave undisturbed their relationships with the federal government. For, clearly, this amendment worked a major and intended shift in power from the states to federal authorities, including federal courts.

Indeed, a central purpose of the amendment was to better secure individual

rights against state authority, an initial intention of the framers' commitment to a federal system in the first instance. Gregory v. Ashcroft, supra, at 2399. Moreover, Section 1's self-executing character, when combined with the states' knowledge that federal courts existed, in large part, to vindicate the individual rights granted, could have lead enacting states to but one conclusion: that any immunity they might have claimed in suits alleging violations of due process or equal protection rights would be scoffed at, not respected once they ratified the Fourteenth Amendment.

How, to put the matter yet another way, could states so elevate individual rights against their own potential abuses and simultaneously assume that the victims of their violations would be without remedy?

The plain language of Section 5 reinforces the self-executing nature of Section 1 and the undeniable conclusion that provision authorized our courts to act as the protectors of the granted rights. See, Dennis v. Higgins, supra., at 870(interpreting the phrase "Congress shall have power...[t]o regulate commerce..." as self-executing and not dependent, for force and effect, upon actual congressional action). Section 5 states: "Congress shall have power...". The provision does not state, "Congress shall have **the power...**"

Had the framers of the Amendment or the States intended to limit the enforcing role of the judiciary, the grant of power to Congress would have been exclusive, a meaning impossible to discern from Section 5's plain language, or the grand intent of the Amendment. Primate Protection League

v. Tulane Education Fund, 111 S.Ct. 1700, 1704 (1991)("we continue to recognize that context is important in the quest for [a] word's meaning." United States v. Bishop, 412 U.S. 346, 356..."; K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291 (1988) ("Court must look to the particular language at issue, as well as the language and design of the statute as a whole.").

Moreover, in determining whether the states consented to the abrogation of their own sovereign immunity, assuming any existed to begin with, this Court should assign considerable importance to the distinction between a constitutional amendment and a statute.

In Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), dissenting from the overruling of National League of Cities v. Usury, 426 U.S. 833 (1976), Chief Justice Burger

recognized that a later ratified constitutional amendment may overcome the effect of a former amendment. At the same time, the majority in Garcia demonstrated how the structure of our government amply protects the states against legislative intrusion into their sovereignty. In Usury, elevating the interests of state rights and seeking to insulate from federal regulation those "matters that are indisputable attributes of state sovereignty," Garcia, supra. at 537, the Court prohibited such regulation of "traditional state functions". Like the doctrine of Eleventh Amendment immunity, Usury was premised on the unique role of the states in our federal system and the need to protect them from federal intrusion.

But in Garcia, this Court held that Usury represented a form of over-

protectiveness neither contemplated by our constitutional scheme nor required by the states as a brake against federal power. The Court recognized that States have other forms of "procedural" protections which amply assure that federal regulators will not trammel their legitimate interests.

The same principle applies here and properly caused the district court to reject DOCS' contention that the Eleventh Amendment limits the clear protections envisioned by the Fourteenth. The ratification process, even more so than the states' indirect participation in the legislative process, represents precisely such procedural protection. Cf., Gregory v. Ashcroft, supra. at 2401 (recognizing that the absence of states' participation in the federal legislative process is the root of the Court's declaration that a

Congressional purpose be unmistakably clear before permitting federal regulations to expand into an area of traditional state concern).

And, by their ratification, state legislatures themselves assented to the fundamental obligations created by Section 1. Just last term, this Court recognized the difference between a constitutional amendment and a statutory enactment. In the former instance, the Court must consider the product to reflect the assent of not only the governing body, but also the governed. "In this case, we are dealing not merely with governmental action, but with a state constitutional provision approved by the people of Missouri, as a whole. This Constitutional provision reflects both the considered judgment of the state legislature that proposed it and the citizens of Missouri

who voted for it." Gregory v. Ashcroft, supra. at 2406. Likewise, here, ratification of Section 1 by the states represented not merely its assent to its dictates, but a desire to bind each state in furtherance of the enumerated individual rights created. The Second Circuit gave short shrift to the force of this ratification and, to the rights thereby created against the states.

Indeed, the opinion not only degrades the role of the federal judiciary; it also tends to negate the intent of Congress and the ratifying states which sought to extend meaningful protection of individual rights.

2. **The opinion below elevates the interests of states over the interests of individuals in an unwarranted manner at the same time it subordinates the role of the federal courts.**

The decision below admittedly has

left petitioner with no remedy for the deprivation of his right to equal protection. Assuming the allegations of his Complaint are true, the State of New York has a policy and practice of more harshly disciplining minority corrections officers than whites; petitioner fell victim to that policy, but cannot gain redress for the denial of his right to equal protection of the laws.

Correlatively, the opinion below limits the efficacy of our federal court system: federal courts are unable to provide victims of racial discrimination with "make whole" relief.

The court below justified this outcome by reference to the alleged need to protect state fiscs from awards of damages to victims of intentional racial discrimination.

Petitioner submits that the opinion below mis-prioritized our constitutional values. In the absence of a "textually demonstrable commitment of [an] issue to a coordinate [political] branch," Baker v. Carr, 369 U.S. 186 (1962), we presume that justiciable constitutional rights are to be enforced through the courts. And, unless such rights are to be merely precatory, the class of those litigants who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce those rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." Davis v. Passman, 442 U.S. 228, 242 (1979).

It is for this reason - to allow the vindication of fundamental rights -

that this Court upheld the authority of federal courts to create a constitutional common law in Bivens, supra.

Nor does the logic of Edelman v. Jordan, supra. and Milliken v. Bradley, supra., square with economic realities or offer a sound or logical decision rule. If a state may pay for remedying the vestiges of discriminatory educational practices, why should it not be required, upon a like showing of racial discrimination, to pay for the reconstruction of a victim's life. Certainly in both instances, the required payments will have, it is hoped, a curative effect - on the one hand, in affording better educational opportunities to the victims of discrimination and, on the other, in helping an individual victim of pernicious race-based discrimination

repair the damage to his identity and life.

The opinion below seeks to distinguish "damages", which it claims are prohibited, from the "public expense" of remedial programs aimed at remedying "past discrimination" in public education. While the latter relief is broader in application and effect, its source - a violation of the constitution - and its purpose - to remedy that violation through money - are the same as here. Semantics should not be used to ennoble one form of relief and proscribe the next.

CONCLUSION

FOR THESE REASONS, THE COURT SHOULD ISSUE THE REQUESTED WRIT AND REVERSE THE DECISION OF THE COURT OF APPEALS.

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